FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

February 22, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
22.	:	Docket No. WEST 99-102-M
	:	A.C. No. 45-03253-05517
CENTRAL WASHINGTON CONCRETE, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). On January 19, 1999, the Commission received from Central Washington Concrete, Inc. (ACentral Washington@) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. ' 815(a). The Secretary of Labor does not oppose the motion for relief filed by Central Washington.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor=s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. ' 815(a).

In its request, Central Washington contends that, while it cannot dispute that it received the proposed penalty, Ait was not brought to management=s attention that the Proposed Assessment had been received.@ Mot. at 1. Central Washington asserts that it did not learn of the proposed penalty until it received a December 9, 1998 notice from the Department of Labor=s Mine Safety and Health Administration demanding payment. *Id.* at 1-2. By that time, however,

the thirty-day deadline for submission of the request had already passed. The operator also submits that it intended to contest the proposed penalty and has contested the penalties proposed in a related case, Docket No. WEST 99-39-M. *Id.* at 2. Finally, the operator requests that the instant matter and Docket No. WEST 99-39-M be consolidated for further proceedings. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Central Washington=s position.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether Central Washington has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission=s Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In view of the fact that the Secretary does not oppose Central Washington=s motion to reopen this matter, Commissioners Marks and Riley conclude that the motion should be granted.

Distribution

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